

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
Agricultural Commissioner of
the County of Santa Barbara
(County File No. 025-ACP-SB-05/06)

Administrative Docket No. 132

DECISION

**G & S Farms
511 East Main Street, Ste. B
Santa Maria, California 93454**

Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and California Code of Regulations (CCR), title 3, section 6130, county agricultural commissioners may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Santa Barbara County Agricultural Commissioner found that the appellant violated FAC section 12973 by using a pesticide in conflict with a condition of a permit issued by the commissioner. The commissioner imposed a total penalty of \$250.

G & S Farms appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5

Factual Background

On October 17, 2005, the appellant applied a pesticide, methyl bromide, at "Ranch 12," Restricted Materials Permit number 42-05-4202238, and posted warning signs as required by the permit. The restricted entry interval (REI) for that application was eight days. On the night of October 18, 2005, it rained. As of 8:00 a.m. on October 19, 2005, the warning signs at Ranch 12 lay on the ground, and were not legible and visible.

Appellant's Contentions

Appellant argues on appeal that it should be excused for its failure to maintain visible and legible warning signs throughout the restricted entry interval because it could not help that the signs were on the ground on the morning of October 19. Appellant points out that the rain was beyond its control and it was doing its best to assess any damage to the warning signs.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence in the record, contradicted or uncontradicted, to support the commissioner's decision. Witnesses

sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Director decides that matter using her independent judgment.

Analysis

The use of any pesticide shall not conflict with any limitations applicable to the conditions of any permit issued by the commissioner. (Food & Agr. Code, § 12973.) The parties agree that the commissioner issued a Restricted Materials Permit for appellant's use of methyl bromide at issue in this case (MBr Permit), which contained the following limit:

"Prior to beginning the application, the applicator shall insure that Warning Signs shall be posted . . . The signs must remain legible and visible until the expiration of the restricted entry interval." (MBr Permit, Condition I.)

The following facts are not contested. The appellant applied methyl bromide at Ranch 12 on October 17, 2005 (testimony of Mr. Gressar of G & S Farms). As of 8 a.m. on the morning of October 19, 2005, the warning signs posted for Ranch 12 were not legible and visible (testimony of Inspector Donlon). The applicable REI was 8 days (MBr Permit, Condition H). Thus, substantial evidence supports the Hearing Officer's conclusion that appellant's use of the pesticide conflicted with Condition I of its permit, a violation of FAC section 12973.

Neither FAC section 12973 nor Condition I of the permit contain language that qualifies the posting requirement. The permit required the warning signs to be visible and legible throughout the REI. Since the signs were down during the REI, appellant's use of the methyl bromide was in conflict with its permit. Not only the straightforward language of the permit, but the nature of activity being regulated counsels against reading exceptions into the permit condition. Application of methyl bromide is, potentially, highly dangerous. The commissioner correctly enforced the permit condition by holding the applicator responsible for the condition of warning signs required for the purpose of mitigating that risk. The Hearing Officer was not required to consider whether compliance was difficult or expensive.

As a general principle, the law does not require the impossible. Thus, the Hearing Officer properly framed the issue as whether it was *possible* for appellant to comply with its permit. Since "impossibility" is an excuse for a violation, the appellant, not the commissioner, bore the burden of proving that it was impossible, as of 8 a.m., to have the warning signs visible and legible. Substantial evidence in the record supports the conclusion that this burden was not met. Appellant argues that it cannot control the rain. However, it is possible, though perhaps more

expensive, to use signs that can better withstand rain than cardstock and staples. Appellant argues that its employee was checking the signs as quickly as he could. However, it is possible for appellant to hire more workers capable of maintaining signs or fumigate fewer sites at a time.

According to the parties' stipulation, the \$250 fine amount is appropriate.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$250 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: _____

1 August 2006

By: _____

MaryAnn Warmerdam
MaryAnn Warmerdam, Director